

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

FRENCH AMERICAN SCHOOL OF
THE PACIFIC NORTHWEST, d/b/a
PORTLAND FRENCH SCHOOL

and

Case 36–CA–10711

ASSOCIATED FRENCH SCHOOL EMPLOYEES,
AMERICAN FEDERATION OF TEACHERS –
OREGON, AMERICAN FEDERATION OF
TEACHERS, AFL-CIO

Susannha Merritt, Esq., for the General Counsel.
Eben Pullman, Field Representative, for the Union.
Edwin A. Harnden, Esq. (Barran Liebman Attornies),
of Portland, Oregon, for PFS.

DECISION

STATEMENT OF THE CASE

William G. Kocol, Administrative Law Judge. This case was tried in Portland, Oregon, on October 19–22, 2010. The charge was filed August 18, 2010¹ by the Associated French School Employees, American Federation of Teachers—Oregon, American Federation of Teachers, AFL–CIO (herein the Union) and the complaint was issued August 27. The complaint alleges² that the French American School of the Pacific Northwest, d/b/a Portland French School (PFS or the school) violated Section 8(a)(1) by telling employees that a union is a stigma that stigmatizes the school and its principal, threatening and impliedly threatening to close the school, telling employees that the school had the biggest card to play against the union organizing campaign, soliciting grievances, promising to remedy grievances, threatening employees with more severe disciplinary action, and impliedly threatening employees by referring to the tenuous nature of their employment. The complaint also alleges that PFS violated Section 8(a)(1) by maintaining rules that restrict employees from complaining about their job or the school and forbid employees from disclosing confidential and sensitive information about the school and its employees. Next, the complaint alleges that PFS violated Section 8(a)(3) by changing the benefits of employees imposing deadline for signing an employment contract renewal and cancelling the work visa for employee Patricia Raclot and thereafter failing to renew her employment contract. Finally, the complaint alleges that the PFS

¹ All dates are in 2010 unless otherwise indicated.

² The complaint was originally consolidated for hearing with the objections filed by the Union in case 34-RC- 6481. On October 7 the Regional Director approved an agreement by the parties to a set aside the election and conduct a rerun election; the RC case was then severed from the CA case.

violated Section 8(a)(3) and (4) by issuing a final warning to employee Massene Mboup. PFS filed a timely answer that admitted the allegation in the complaint concerning filing and service of the charge, jurisdiction, labor organization status, and agency status; PFS denied that it violated the Act.

On the entire record³, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, PFS, and the Union⁴, I make the following.

FINDINGS OF FACT

I. JURISDICTION

PFS, a corporation, operates an international French immersion school at its facility in Portland, Oregon, where it annually derives gross revenues in excess of \$1,000,000 and purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Oregon. The school admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

PFS, a primary school, strives to offer a strong multilingual education to children in a nurturing and culturally diverse environment that hopes to achieve academic excellence, life-long learning, and global citizenship. Its philosophy is to feature what it believes to be the best of the French and American educational systems and it is accredited by the French Ministry of Education. PFS is administered by a Board of Directors. David Rudder is Chair of Board. Bob Scanlon and David Reichle are members of the Board. Scanlon, a successful businessman, is former Chair of the Board; he played an important role in dealing with financial issues that FTS experienced in the past. Elimane Mbengue is Head of School; as such he is in overall charge of the day to day operations of the school and its employees. Mbengue reports directly to the chair of the school's board of directors. Nancy Steensma is the administrative coordinator for the school. The school actually consists of at least two buildings, the main building and the annex building which is located near the main building.

Handbook

At all material times PFS has used a handbook that it distributes to employees. The handbook contains the following provisions:

The No Complaining Rule

Staff and faculty should share their frustrations about their **job**, the school, parents, students or anything else, with their coordinator, Head of School or someone who is a position to address the complaint. However, the employee must share one or two

³ I grant the unopposed portions of the General Counsel's motion to correct the record, items 1-8 and 10-17. The record is replete with other errors too numerous to correct. I ask the General Counsel to address these concerns with the reporting service.

⁴ I grant the Union's unopposed motion to file a late brief.

possible solutions with their complaint as well. Mindlessly complaining to a coworker can be devastating to the moral [sic] of the team and is counterproductive....

Confidentiality and Professionalism

Many employees during the course of their work at Portland French School have access to confidential and sensitive information. The unauthorized disclosure of information including that concerning students, siblings, parents, relatives, donors, co-workers, employees, curriculum, programs, procedures, or any unauthorized information may have an adverse impact upon the integrity of Portland French School. No employee may disclose any information pertaining to the organization, its donors, parents, students, employees, or partners without prior approval from the Head of School. Violation of confidentiality will be grounds for disciplinary action up to and including immediate dismissal.

Analysis

The complaint alleges that the foregoing provisions are unlawful under Section 8(a)(1). I apply *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) to determine whether the foregoing rules violate the Act. Section 7 of the Act protects the right of employees to talk to each other and to others about working conditions, including working conditions that they dislike. This is so because those discussions may lead employees to seek union representation or otherwise engage in collective action to attempt to change the working conditions. *Verizon Wireless*, 349 NLRB 640, 658 (2007); *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). The nocomplaining rule forbids employees from discussing working conditions with each other and others. The confidentiality and professionalism rule is somewhat less clear. It begins by discussing “confidential” information but also includes “sensitive” information within its purview. Sensitive information may have a broader scope than confidential information. But then the next sentence identifies the unauthorized disclosure of “information,” including information about employees and coworkers, as the harm the rule is addressing. The third sentence then forbids that disclosure of “any information” concerning employees without prior approval of the Head of School. Employees may reasonably read this rule to forbid disclosure of the working conditions of employees without prior approval. In its brief PFS relies on Head of School Mbengue’s subjective intent concerning the intent of the rules; but his subjective intent is simply irrelevant in assessing the legality of the rules. Nor is it relevant that no one has been formally disciplined for the rules; these unlawful rules, by their very existence, have a chilling effect on the free exercise of employees’ Section 7 rights. I conclude that by maintaining work rules that forbid employees from discussing working conditions with each other and others and from disclosing working conditions at PFS without prior approval, PFS violated Section 8(a)(1).

Organizing Campaign

In late 2009, the Union began an organizing campaign among the teachers and staff at PFS. The employees on the Union’s organizing committee were Alice Beauvallet, Martine Durade, Massene Mboup, Cary Page, Benedicte Ricordel, Rebecca Conant, and Patricia Raclot. On March 8 members of the organizing committee presented Head of School Mbengue with the following letter.

To the Administration and Board of Directors of Portland French School:
We, the organizing committee of the employees of the Portland French School believe
It is just and necessary to organize at our school for the following reasons:

- We should have the right to engage in collective bargaining and have a powerful voice concerning our working conditions as well as our students' learning environment.
- We need salaries on which we can live and that convey to us that we are respected as professionals by honoring our educational accomplishments including our degrees and certifications and our years of service.
- We should have the right to be able to respectfully disagree with the administration of the school in a safe environment.
- We expect accountability when resolving concerns or complaints with the administration and to that end we should be able to have a representative of our own choosing present at meetings of the school board of directors.
- We believe professional development and guidance is vital to help all employees reach their full potential.
- In order to assure fair treatment and protection from unjust discipline and termination we need quality representation that will make sure that due process is followed.

Addressing our concerns will have a positive effect on the quality of education, by improving the ability of the school to attract the highest quality instructors and retain them for greater stability and consistency for the students and the school. Transparency will demonstrate that the administrative leadership is open to constructive dialogue with the staff in order to build a stronger school together.

We expect that as responsible administrators and directors you will take the following actions:

- 1.) Respect the rights of its employees to choose for themselves whether to form a union or not by remaining neutral and refraining from campaigning against union organizing efforts
- 2.) Voluntarily recognize our union which is allowed under the National Labor Relations Act since the majority of employees has chosen to form a union.
- 3.) After our union is recognized, you will meet us at the bargaining table to negotiate with us in good faith in order to reach a collective bargaining agreement. This agreement will ensure that our working conditions will allow us to continue to offer a high quality education to the students of the Portland French School.

We would like to meet with you on March 11 or 12th to discuss this matter fully. Please let us know by contacting us via our professional email addresses if you are available to meet.

The letter was signed by each of the seven members of the organizing committee. Mbengue accepted the letter and agreed to meet with the committee on March 11. However, on March 9 Mbengue notified the organizing committee that he was rescheduling the meeting to March 22. He asked for a list of issues the committee wished to discuss in advance of the meeting so that he could inform the board of directors and speak to legal counsel. The organizing committee replied on March 10:

Dear Ellimane,

We received your email request to reschedule our meeting from Thursday, March 11

to Monday, March 22. We are formally asking you to voluntarily recognize our union. While we understand your need to think about our request, we need a meeting much sooner than March 22 because we need to start this process more promptly. We will be filing a petition to request recognition as a union with the National Labor Relations Board on Thursday, March 11.

Please let us know if you are available at another time on Thursday or Friday of this week. If not, please tell us if there is time early next week when you can meet with us.

The message was again signed by each of the seven members of the organizing committee. During the organizing campaign the Union also distributed leaflets to employees. These leaflets contained the names of the seven members of the organizing committee.

On March 12 the Union filed a petition to represent all full-time and regular part-time employees of the School. The parties stipulated to an election that was held on April 16. The results were that challenged ballots were determinative. On May 27 a hearing was held on the challenged ballots.

March 22 Meeting

On March 22 the Union's organizing committee met with Mbengue in his office. Mbengue attempted to reach members of the board of directors to join the meeting, but he was unsuccessful. He did, however, summon Nancy Steensma who took notes of the meeting. Mbengue quickly got angry and raised his voice. He said that the union organizers had dehumanized the school. He continued saying that a union at the school was a stigma, that it was stigma on the principal and on the school itself. Mboup, who had known Mbengue for 20 years, asked Mbengue not to take it personally, that they just wanted to be legally represented. Mbengue said that bringing a union in the school would lead to the closing of the school. The organizers asked why and Mbengue explained that a union would scare away parents. The organizers again asked why. Mbengue gave two reasons. He said that most parents bring their children to the school to get away from the Portland public schools, that the Portland public schools suck, and the Portland schools suck because of the employee unions. He also said that parents would take their kids from the school because they would not want to be around the conflict. He pushed a copy of the union's organizing principles, described above, towards the employees and said that they should show it to the parents and they will learn that what he was saying was correct, that if they have a union at the school the parents will take their children out of the school. On two occasions Mbengue used a card game metaphor, but he prefaced those comments by saying that he had to be very careful how he said this. He said that in this situation the union organizers do not have the biggest card and the parents do not have the biggest card. Mbengue said that he had the biggest card to play and that everyone in the room was smart enough to know what that means. At some point Mbengue said that his purpose in the meeting was to talk them out of their union organizing efforts at the school. Beauvallett responded that a majority of the employees had already signed cards for the Union. Mbengue replied that he only saw six employees in front of him and only seven that had signed the letter.

The facts concerning the March 22 meeting are based on a composite of the credible testimony of Cary Page, Massene Mboup, Alice Beauvallett, and Patricia Raclot. Page has worked at PFS for over seven years and was still employed there at the time of the hearing. Her demeanor was impressive; she struck me as a person who was in the habit of being precise and accurate. Likewise, Mboup has worked at PFS since 1999 and was employed there when he gave his testimony. His demeanor was convincing as he remembered details of the meeting that seemed important to him. Alice Beauvallet has worked for the school as teacher since

2006. Her testimony corroborated that of the others. I have also considered the testimony and notes of the meeting of Nancy Steensma. Steensma is director of admissions and administrative services for PFS; she has worked there for almost nine years. Based on my observation of her demeanor and assessed against the testimony of the other witnesses, I do not credit her testimony to the extent that it is inconsistent with the facts described above. I conclude the notes are a somewhat sanitized version of what Mbengue actually said at the meeting. Even so, the notes indicate that Mbengue said that he holds the cards and will play them and that he had heard from parents that they were not in favor of a union and they would unenroll their children if there is a union at the school. I have also considered Mbengue's testimony. He basically testified that Steensma's notes were an accurate reflection of what occurred at the meeting. Mbengue's attempt to explain how the discussion of him having "the biggest card" arose during the meeting seemed palpably untrue, especially in light of the version he gave in his pretrial affidavit. I do not credit his testimony to the extent it is inconsistent with the facts described above.

Analysis

The complaint alleges that at this meeting Mbengue unlawfully coerced employees by telling them that a union is a stigma that stigmatizes the principal and the school, threatened school closure by telling employees that a union will scare away parents and cause the school to close, and impliedly threatened employees by telling them that he had the biggest card to play concerning the union and that the employees were smart enough to know what that means. I have described above how Mbengue made each of these statements at the meeting. By telling employees that the union was a stigma and stigmatized the school and its principal, PFS was equating unionization with disloyalty. Doing so is unlawful and PFS violated Section 8(a)(1). *House Calls, Inc.* 304 NLRB 311, 313 (1991). In assessing whether Mbengue's comments concerning the school closing violate the Act, I apply *NLRB v. Gissel Packing, Co.*, 295 U.S. 575, 618 (1969). There is no objective evidence in this record to support the assertion that parents would withdraw students from the school simply because of unionization. Nor is there objective evidence that even if students left the school that other students would not replace them; presumably turnover to some degree occurs at the school for a variety of reasons. So that even if some parents did withdraw their children from PFS because the employees decide to be represented by a union, there is no objective evidence that school closure would follow. By threatening employees that the school would close if employees decided to be represented by a union, PFS violated Section 8(a)(1). Finally, Mbengue told the employees that he had the biggest card to play in the organizing effort, and that the employees understood what he was saying. Remember, Mbengue has the authority to discharge and discipline employees. Mbengue's statement amounted to a threat of unspecified reprisals if the employees continued to support the union, and it thereby violated Section 8(a)(1).

March 26 Meeting

On March 25 Mbengue notified employees that a "captive audience meeting was to be held the next day and everyone was required to attend." The next day the meeting began as scheduled at 2 p.m. but lasted well beyond the scheduled 2-hour period. Present for management were Mbengue, Chairman of the Board David Rudder, Board Members Bob Scanlan and David Reichle, among others, and all employees and some parents. Rudder started the meeting by introducing himself and the other members of the Board. Rudder told the assembled employees that they were not required to stay and could leave if they wanted. Rudder also stated that they were not allowed to make any promises because that would be seen as illegal because there was a pending election.

Scanlan then took the floor and described the financial and other contributions he had made to PFS. Scanlan stated that by organizing a union they were jeopardizing everything he had done for the school over the last seven years. He stared at a group of the union organizing committee members who were sitting together. He said "You don't scare me. I've been up
 5 against much tougher unions than you." Becky Conant replied that she did not see why this has to be confrontational. Scanlan answered that it was already confrontational and "You have threatened us and threats cut both ways." At one point Alice Beauvallet spoke and said that the teachers' salary was not adequate. Scanlan responded angrily by asking where did she think the money was going to come from, from her union? This caused Beauvallett to cry and she left
 10 the room for a time. Scanlan also said that if they succeed in bringing a union to the school he was afraid they were running the genuine risk of destroying the school. He said that if they succeeded in bringing a union to the school, the school would close within a year. When Scanlan was asked why that would happen and what he meant by that, Scanlan explained that he would no longer be around, that he would resign from the school board, that Mbengue would
 15 probably resign as principal, that Board Member David Reichle would resign from the school board and take his children out of the school and at that point parents will start taking their children out of the school until the school has to close. Scanlan also stated that PFS attracts families that are wealthy and that in his experience those families tend to be antiunion. Scanlan described how there was small margin of students whose enrollment allowed PFS to operate
 20 without incurring debt. Scanlan stated that If there is ever a time not to raise a union, it is now, because the economy was down, and if there was a union, and the school lost enrollment, there would be a possibility the school would not survive. Scanlan continued, saying that there were generally two reasons people formed unions, one was to get more money and the other was to keep from being fired. He then looked directly at the group of union organizers and said "Do
 25 any of you think that a union can keep you from being fired?" Scanlan was speaking loudly in a challenging manner, leaning towards the organizers. Some of the organizers shook their heads and other said no. At one point Scanlan said that it was a matter of miscommunication and miscommunications cause wars, divorces, bankruptcies, and unions. Scanlan said that if the employees were to withdraw the petition for the union they could resubmit it in six months. He
 30 asked what harm would it do to withdraw the petition and learn more about the union and then resubmit it if they still wanted a union.

Mbengue also addressed the employees at this meeting. He told the employees that if they were even five minutes late he had the right to fire them and so long as he had
 35 documentation no one could stop him from doing so, not the union or anyone. Mbengue said that they cannot promise anything but that the employees should give the school 6 months.

It was then David Rudder's turn to speak again. He said that the Board was now listening to the staff and was aware of the problems. Rudder asked what if the employees
 40 waited six months before forming a union and see what the school was able to do and then see if the employees still wanted to form a union.

Scanlan announced that he wanted everyone to break up into small groups to continue the discussion. Mbengue followed by saying that no one was to leave until all the problems had
 45 been discussed. The meeting then broke apart and discussions continued in small groups. At one point Page commented to Scanlan that two teachers had been told that their contracts would not be renewed and two other employees had received written warnings and they had been active in the Union. Scanlan answered that this would not be the first time that people who were all ready going to be fired form a union to prevent that from happening. Beauvallett
 50 began talking with David Reichle. Reichle asked why she wanted a union, and Beauvallett explained that they had tried to find solutions for problems and were unsuccessful and they were actually scared of losing their jobs. Reichle answered that they were not aware of what

was going on and now that they knew they needed time to work and find solutions but they were going to find solutions.

My factual findings concerning the March 26 meeting are based on a composite of the credible testimony of Page, Beauvallett, Mboup, Raclot, Benedicte Ricordel, and Malika Smaini, a teacher assistant who has worked at PFS since 2001 and remained employed at the time she gave her testimony. Smaini's recollection of the meeting was not as detailed as Page's; she nonetheless corroborated Page's testimony to a significant degree. Ricordel has worked for the school as a teacher since 2006. Her testimony likewise corroborated to some degree the testimony of the others. I have also taken into account admissions that Scanlan, Rudder, Mbengue, and Steensma made concerning this meeting. Also relevant to my findings is a five-page message Scanlon sent on March 31 on the subject of "PFS Teachers and Staff Seeking to Join AFT, AFL–CIO." Among other things, Scanlan indicated:

It has been said by some that "no good deed goes unpunished". I have not subscribed to this cynical approach to life, however the latest turn of events at PFS did bring it to mind.

Some of the parents may not be aware that a number of faculty members have petitioned for an election to be conducted by the National Labor Relations Board to determine if the schools employees (teachers and staff) wanted to be represented by AFT, AFL–CIO.

In my opinion, lack of communications causes divorces, bankruptcies, wars and–unions. This seems to fit the motivation of the petitioners.

...

The law is very clear as to what the Administration and Board can and can't do during the current election process. PFS can not make any threats or promises regarding the teachers' attempt to organize and be represented going forward by a union. It is their right and the Board and Administration believes it has and will abide by the law as enforced by the National Labor Relations Board.

I heard the comments of last Friday's meeting as primarily the teachers wanting to have more of a voice in those matters of concern to them and to a lesser, but yet vocal extent, higher salaries. As stated, neither the board members nor Ellimane made any promises at the meeting, indeed we repeated several times since filing their petition, we are prohibited from doing anything but listening and/or stating facts relative to the school. We could also state our opinions as to what may or may not happen to PFS if the teachers organize for the purposes of collective bargaining.

PFS tuition requires \$20,000+ of pre-tax income for a parent to send a child to PFS elementary, \$38,000 for two, etc. This requires significant disposable income. It is my opinion that parents in this income bracket are more likely to be anti-union than pro-union. If true, we may lose students whose parents oppose some of their tuition being forwarded to the union by the teachers. If only 10% of our parents meet this definition, enrollment could go down by as much as 24 students—or a decrease in tuition level proceeds of \$294,000. The current budget, which now pays 57% of gross revenue from all sources to salaries and—benefits assumes a surplus of \$40,000—a too thin margin of safety. This potential change in enrollment would result in a deficit in 2010-11 of \$254,000.

...

PTS tuition is set up in response to the market \$12,250 and \$13,050 per year ... Tuition accounts for 92% of PFS's gross revenues. Statewide bankruptcies the last three years were 9,386 in 2007, 12,373 in 2008 and 18,380 in 2009. It is anticipated 2010 will be some 24,000.

I suggested at the meeting that if the teachers withdrew their petition for Union representation, they could re-file in six months. As this would include the summer months, they could re-file in September. In the meantime they could seek whatever information they desire from the Administration and the Board between now and then to allow them to make the most informed decision they can in their best interests.

Let me start this compilation of their research by advising them that as someone who started out life to be a teacher, I strongly disagree that PFS, its faculty, students and parents would be best served by the teachers and staff bringing in an outside third part to communicate on their behalf. Give the Board a chance to listen to your legitimate concerns without their inability to respond because of the legal restrictions you have placed on them.

Finally, as someone who has had to lay off 35% of my employees since January of 2008, who also voted to approve your 7% average increase for next year without any lay offs at PFS, I am hereby submitting my resignation from the Portland French School Board of Trustees. And, no, I didn't get \$200,000 per year from PFS. I never received one cent from PFS (nor has any other board member), have given the school more in the last 8 years than I gave to my college alma mater, and indeed sent \$2,000 to PFS two weeks ago.

...

A young man on the faculty told me I had no data to suggest that parents might take their children out of PFS if it became union. I did not claim I had data—I do have decades of dealing with high net-worth individuals, which formed my opinion. I asked him how long he planned to stay there. He said "one year." I suggested that if he was wrong and I was right—PFS might very well close—and I was staying in Portland. I resented his cavalier risking of its possible closure. He claimed more people would send their children to PFS because it was unionized. Given that there are 120 schools in the eight Pacific Northwest Association of Independent Schools and none are unionized, I trust my lack of data more than his lack of data.

...

At the very least, it would seem voting in the union would pose a threat to the 8% of PFS gross revenues not from tuition, i.e. \$224,000. This is money donated to the school by parents and friends of PTS who by virtue of their economic ability to do so, tend to be more anti-union than the general population. A 50% drop in the amount without any loss of enrollment, would produce a 201-2011 deficit of \$75,000. An 18% drop would wipe the budgeted 2010-2011 surplus of \$40,000.

...

As the first school of PNAIS' 120 schools in 8 states to become unionized, in addition to risking students being withdrawn, you also risk Ellimane resigning. This, in my opinion, would be a great injustice.

...

I make several observations about this letter. The anger and sense of betrayal felt by Scanlan at the employees because they chose to exercise their rights protected by law are apparent. And even though I conclude that Scanlan was more direct at the meeting, as the employees testified and as he revealed in his pretrial affidavit, the letter nonetheless corroborates some of that testimony. I have again considered the testimony of Nancy Steensma and notes of the meeting that she made. Among other things, her notes confirm that Rudder asked the employees what problems led them to seek union representation, and that Scanlan said that threats go both ways and the employees had threatened the school with the union and that he felt that parents were antiunion and would remove their children from the school. According to the notes Scanlan said "It's risking eight or nine years of my life out of business." The notes also indicate that Scanlan suggested that the employees withdraw the petition and that if the

petition was meant to get the school board's attention then the school board "has heard the message loud and clear and within the law." But otherwise I do not credit Steensma's testimony; her demeanor was not convincing. For example, after I overruled an objection made by the General Counsel to a question posed by PFS's counsel, I asked Steensma whether she
 5 heard anything during the meeting that sounded like a threat other than the reference that threats go both ways. She answered "No, I did not—I do not recall." Her discomfort in answering my question was palpable. Yet in her pretrial affidavit she stated that at the meeting Scanlan stated something like "If there is ever a time not to raise a union, it is now, because the economy was down, and if there [was] a union, and the school lost enrollment, there would be a
 10 possibility the school would not survive." For his part, Mbengue admitted that Rudder said that the school board did not know what was going on and wanted to know why they wanted a union, to listen although they could not promise anything. But Mbengue's testimony about this meeting was sometimes vague and conclusory and his demeanor again was not persuasive. I do not credit his testimony to the extent it is inconsistent with the facts described above.
 15 Similarly, Rudder's testimony about this meeting lacked detail and he was evasive; his demeanor too was unpersuasive. Rather, I conclude that his pretrial was more credible; it corroborates to some degree my factual finding concerning the meeting.

Analysis

20 The complaint alleges that several agents of PFS violated the Act during the course of the March 26 meeting. First, the complaint alleges that Mbengue unlawfully solicited grievances regarding working conditions and safety issues and threatened employees with more severe disciplinary action. As set forth above, during the meeting Mbengue said that they cannot
 25 promise anything but that the employees should give the school six months. In the context of other statements made at the meeting, and notwithstanding the explicit disclaimer that Mbengue included, it was nonetheless clear that Mbengue was asking the employees to forego their union for 6 months to give the school an opportunity to address their concerns. By implying that it would remedy employee grievances if the employees stopped their union activities, PFS
 30 violated Section 8(a)(1). *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). I have described above how Mbengue said that if employees were even 5 minutes late he had the right to fire them and so long as he had documentation no one could stop him from doing so, not the union or anyone. By threatening employees with more severe discipline because they supported a union, PFS violated Section 8(a)(1). *Metro One Loss Prevention*, 356 NLRB No. 20 (2010).

35 Next, the complaint alleges that Rudder unlawfully solicited grievances regarding their opinions and issues, solicited grievances and made promises to remedy grievances regarding the PFS Board and Mbengue's approach to issues, and impliedly threatened employees by referring to the tenuousness of the employment. As set forth above, I have concluded that
 40 Rudder said that the Board was now listening to the staff and was aware of the problems. Rudder asked what if the employees waited 6 months before forming a union and see what the school was able to do and then see if the employees still wanted to form a union. By implying that the school would remedy employees grievances if the employees stopped their union activity, PFS violated Section 8(a)(1). The counsel for General Counsel argues in her brief that
 45 PFS violated the Act when either Scanlan or Rudder told employees at the meeting that it was not the first time that employees who were about to be terminated sought union representation. However, the General Counsel does not support that assertion with legal authority and it seems to me that the statement was merely an effort to describe why some employees might seek union representation. I dismiss this allegation of the complaint.

50 Continuing, the complaint alleges that Scanlan unlawfully threatened and also impliedly threatened that the school would close due to the organizing campaign, threatened employees

with unspecified reprisals by saying that threats go both ways and threatened employees by tying the organizing effort to the destruction of the school. I have concluded that Scanlan told the employees that the school could close within a year as a consequence of PTS board members and head of school resigning and antiunion parents taking their students from the school as a result of unionization. Scanlan also stated that If there ever was a time not to raise a union, it was now, because the economy was down, and if there was a union, and the school lost enrollment, there would be a possibility the school would not survive. For reasons previously stated, these statements were unlawful threats of school closure and violated Section 8(a)(1). I have concluded above that Scanlan told the employees that the union organizing efforts had threatened the school and that threats go both ways. This statement was an unlawful threat of unspecified reprisals and violated Section 8(a)(1).

Finally, the complaint alleges that Reichle unlawfully promised prompt remedy of employee grievance by the PFS Board of Directors. As described above, Reichle asked why Beauvallet why she wanted a union and Beauvallett explained that they had tried to find solutions for problems and were unsuccessful and they were actually scared of losing their jobs. Reichle answered that they were not aware of what was going on and now that they knew they needed time to work and find solutions but they were going to find solutions. By again implying that PFS would remedy employees grievances if the employees stopped their union activities, PFS violated Section 8(a)(1).

Contract Renewal Deadline

The 2009–2010 contracts between PFS and the teachers contained the following provision:

This contract may be renewed in the sole discretion of the Head of School acting on behalf of the School by written agreement between both parties no later than April 15 of the school year in progress.

Similar deadlines appeared in earlier contracts. However, these deadlines were not strictly enforced. For example, on one occasion Cary Page forgot to sign and return her contract by the due date. She apologized to Mbengue for returning her contract late and there were no repercussions. On April 9 Mbengue distributed renewal contracts for the 2010–2011 school year to the teachers. As he gave teachers their new contract he required them to first sign the following form:

I, the undersigned, acknowledge that I have received the 2010–2011 teaching contract and that I understand that I have to review it, sign it and return it to the Head of School no later than Friday, April 16 at 12 pm. Failing to do so may be understood as declining the contract offer. You can still request a meeting with the Head of School to discuss the terms prior to the due date.

Mbengue admitted that in the past, teachers had not adhered to the April 15 deadline and that it was an effort to require stricter adherence to the deadline. And remember that April 16—the deadline date—was the date of the union election. This was the first time the teachers were required to sign this form before they received their renewal contracts; it was also the first time that there was an explicit acknowledgement that failure to meet the deadline could be understood by the school as a declination of the contract offer.

Analysis

The complaint alleges that PFS imposed the contract renewal deadline because employees supported the Union. Mbengue testified that problems are created when the teachers failed to submit their contracts on time, but he did not credibly provide testimony concerning why PFS decided at this time to require strict adherence to a deadline or why it was necessary to create an explicit and tough consequence for the failure to meet the deadline. The consequence for the failure to sign—the termination of employment—is, contrary to PFS’s argument in its brief, clearly a term and condition of employment. Recall that Mbengue had earlier unlawfully threatened employees with reprisals by telling them that he had the biggest card and then later that he would be stricter in giving discipline to the employees. And the due date for signing the contracts was the day of election; this timing was certainly apparent to the employees. Nor is there any credible reason as to why this strict of a measure was needed at all. By imposing a contract renewal deadline because the employees supported a union, PFS violated Section 8(a)(3) and (1).

Final Warning to Mboup

As previously indicated, Massene Mboup has been a teacher for PFS since 1999. Although not part of an official school program, since about 2003 Mboup voluntarily coached soccer for students after school and on weekends; of course, parents were also involved. Mboup was not initially compensated by the PFS for this after school activity; indeed, Mbengue specifically indicated that Mboup’s coaching was not part of the school activities. French American International School, or FAIS, like PFS is a French immersion school located in Portland, Oregon. Mboup has been coaching soccer for students at FAIS after school for about five years. Mbengue was long aware of the fact that Mboup had been coaching soccer for FAIS. In fact, Mbengue attended soccer matches held at PFS between the teams from PFS, FAIS, and other schools; at those matches Mboup openly acted as coach for the FAIS team.

FAIS competes with PFS for students. Article 10 of the contract between Mboup and PFS provides:

Without the prior written authorization of the Head of School, Teacher shall not, during the term of this agreement:

- (a) Render services of a business, professional or commercial nature to any other person or firm, whether for compensation or otherwise, which would interfere with the fulfillment of his/her obligations at the School; or
- (b) Engage in activity competitive with or adverse to the School’s interest and welfare.

On May 14 Mbengue called Mboup and asked him to come to the office. Mboup inquired as to the purpose of the meeting and Mbengue explained that it concerned FAIS. Mboup asked for an email message explaining the purpose of the meeting and Mbengue indicated he would send a message. After Mboup arrived at the Mbengue’s office, Mbengue summoned Emilie Gerts to be a witness. Mboup then called Alice Beauvallet to the office to be his witness. Mbengue then said that Mboup was working as a soccer coach at FAIS. Mbengue produced brochures from FAIS that pictured Mboup as a coach. Mboup responded that he had been working there as a soccer coach since 2006 and that Mbengue knew this. Mbengue asked whether Mboup had asked for written authorization to work as a coach at FAIS and Mboup said no and that the only authority he needed to work there was from the Immigration Service. Mbengue indicated that in his opinion Mboup’s coaching at FAIS violated his contract with PFS and he was officially asking Mboup to stop. Mboup protested that because he was involved in union activities, Mbengue was trying to intimidate him. Mboup said that the effort would be futile and that Mbengue could not intimidate him. Later Mboup and Mbengue

exchanged email messages recounting this incident; Mbengue, for his part, denied knowing all along that Mboup had been coaching for FAIS. At the hearing Mbengue testified that he had only recently discovered that Mboup had been coaching at FAIS when he coincidentally saw brochures at a coffee shop from FAIS containing pictures of Mboup coaching soccer. I do not credit this testimony. Mbengue's demeanor was entirely unconvincing. Mbengue admitted that he had attended the soccer matches between the schools and that Mboup participated. But Mbengue's testimony that Mboup's participation was limited to that of a referee and not as a coach is simply not believable.

As indicated above, on May 27 a hearing was held to resolve the challenged ballots. Mboup testified at that hearing on behalf on the Union.

On June 10 Head of School Mbengue issues Mboup a "Final Warning." The warning included the following:

FAIS is a direct competitor with PFS and your working for it is a material breach of your contract. But for the fact that we are so close to the end of the school year and termination of your employment would, in my opinion, be detrimental to the pupils who you teach, I would terminate your contract immediately as provided in Article 8. Should you work for FAIS during the term of your 2010-2011 contract without written authorization by Head of School, or otherwise violate your contract, PFS will terminate your contract.

Analysis

The complaint alleges that PFS gave Mboup the final warning because he supported the Union and because he testified in the representation case hearing. I apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S.989 (1982), approved in *NLRB v. Transportation Management*, 462 U.S. 393 (1983). Mboup was a member of the Union's organizing committee and PFS knew this. PFS demonstrated its hostility to this lawful activity by violating the Act as described above. I have also concluded that Mbengue was aware of the fact that Mboup had been coaching soccer after school for FAIS for some time and had never disciplined or even warned Mboup about that matter until after he showed his support for the Union. I conclude that the General Counsel has established a strong initial showing that the warning was motivated by Mboup's union activity. I turn now to examine whether PFS has shown it would have issued the warning even if Mboup had not supported the Union. In this regard PFS argues that it did not know that Mboup had been coaching until Mbengue serendipitously noticed a brochure with Mboup's picture coaching soccer at FAIS. But I have discredited this testimony. Without this factual support PFS fails to meet its burden. By issuing a final warning to Massene Mboup because he supported the Union, PFS violated Section 8(a)(3) and (1). I dismiss the independent Section 8(a)(4) allegation because there is no evidence that PFS was hostile to the fact that Mboup gave testimony before the Board; this is distinct from the hostility it showed concerning Mboup's support for the Union.

Patricia Raclot

Patricia Raclot had worked as a teacher for PFS for 6 years when her contract with the school was not renewed at the end of the 2009–2010 school year. Like other teachers at PFS, Raclot is a French citizen and an employee of the French government as well. She has worked for PFS pursuant to an H-1B visa sponsored by PFS. By all accounts Raclot was a good teacher of the students and Mbengue received compliments concerning Raclot's work from

parents of students in her classes. Raclot and Mboup are in a relationship and live together and Mbengue was aware of their relationship.

The parties litigated an event that occurred in June 2007. During that time Nancy Steensma's son was a student in Raclot's 3rd grade class. According to Raclot the student had behavioral problems with other teachers at the school. Steensma admitted that other teachers had discussed her son's classroom behavior with her. Apparently the son misbehaved in Raclot's class and she gave him a written exercise as punishment. Raclot noted the matter in the student's school book that his parents were to sign. The Steensmas, however, refused to have their son do the exercise. They protested that the punishment was excessive, but the next school day Raclot gave their son another punishment: a written assignment to assess his comportment in school. The Steensma then reacted by removing their son from Raclot's class. In the classroom in front of the class Raclot also said something to the effect that if it were in France then the son would end up in prison in three years. This all lead to a meeting between Steensma, Raclot, and Mbengue. Raclot was not issued any written discipline over this incident. At the hearing Mbengue attempted to explain why he did not take serious disciplinary action against Raclot at that time, but his testimony seemed to me to have been created after the fact for trial purposes. At the hearing Raclot denied she made the "end up in prison" comment in front of the class but instead claimed she said that in the meeting with Steensma and Mbengue, but I do not credit this testimony. In other words I conclude Mbengue sought to magnify the importance of this event while Raclot sought to discount the nature of her conduct. In any event, although I consider this entire event as background, I note that it was not mentioned as a reason for terminating Raclot's contract, Raclot was not issued any written discipline over this incident and Raclot's contract was renewed twice after it occurred.

On April 18, 2008, Mbengue gave Raclot her written evaluation for the 2007–2008 school year. Raclot received a 17 out of a possible 20; Mbengue commented that Raclot displayed very good initiative and had good relations with her colleagues. There apparently was no written evaluation by Mbengue of Raclot for the 2008–2009 school year. However, during that school year Mbengue brought several matters of concern to Raclot's attention. On January 27, 2009, Mbengue issued Raclot and another teacher a "Written Warning" for the same matter. Raclot's warning reads as follows:

This is a written warning for your refusal to execute my instructions regarding the tutoring of Joseph and Negesti. On December 9th I sent you an email to ask you to help Joseph and Negesti in French. On December 18, I sent you another email to instruct you to start the tutoring last week. I have noticed that nothing have been done despite these two messages.

I find such a behavior unacceptable and strongly invite you to start the tutoring. As Head of School I reserve the right to use any corrective action including immediate dismissal. This written warning will be placed in your file.

This was the only written discipline Raclot ever received from PFS. That same day, January 27, 2009, Mbengue sent Raclot a "Written Reminder" as follows:

This is to let you know that attending school committee meetings is a part of working at PTS as stated in this section of the Employee Handbook.
Committee Service

All school employees may be asked to serve from time to time on committees that are constituted to benefit the school. These committees will meet to the extent possible during business hours.

I therefore strongly urge you to actively participate in the Association Process committee. Failing to do that is in stark violation of school policy.

Thereafter Raclot attended meetings are required. During that school year Mbengue also spoke to Raclot about fifth-grade evaluations that Raclot refused to correct. Raclot had completed the evaluations for her class but she and a second teacher were asked to assist the fifth grade teacher correct her students' evaluations. Both Raclot and the second teacher declined to help the fifth grade teacher. Raclot indicated to Mbengue a reluctance to do so because the fifth-grade teacher was difficult to work with and no one had assisted Raclot in doing her student's evaluations. During that school year Raclot also angrily left a teachers' meeting. This meeting concerned a discussion of a school event that Raclot used to organize but then it was organized in a different manner by another teacher. At the meeting Raclot criticized the event and angrily [left] the meeting. During that school year Mbengue also discussed with Raclot how she told another teacher that the teacher did not have to complete two surveys that PFS asked the teachers to complete. Although Raclot explained at trial that she had completed the surveys and the other teacher asked Raclot how she had completed them and Raclot told the teacher that she (Raclot) simply indicated on the survey that she and the other teachers were all doing their jobs and they did not judge each others performance because that was for the administration to do, in her pretrial affidavit Raclot stated that she told the teacher that if she was not at ease answering the survey she did not have to do it. I credit the pretrial affidavit and Mbengue's testimony that Raclot told the teacher that the teacher did not have to complete the survey if she did not feel comfortable doing so. During that school year Mbengue had occasion to discuss with Raclot a wine bar and jazz bistro named Vinideus. Raclot was part owner of Vinideus. Mbengue told Raclot that he had received a complaint from two parents wanted to unsubscribe from email messages they had been receiving about Vinideus but Raclot had failed to do so. The message from the parents, dated May 27, 2009, is as follows:

We would like to make you aware that one of the teachers at school continues to send us emails about her business outside of school after we requested last year to be excluded from the business' email list.

I imagine you know who we are talking about. We aren't necessarily trying to get her in trouble, but it bothers us that a school employee continues to use our email account for non-school related purposes a full two years after Henry was in her class. Our impression has been that emails are to be used only for school communications unless, of course, friendships and relationships are established that extend outside of school. We ask that you tell your employees that emails should be used only for school-related purposes, unless otherwise approved by families. Her business' most recent email did not give us an option to unsubscribe to emails, so this is why we brought this matter up to you. We appreciate your attention to this matter.

For several days thereafter the parents continued to receive emails from Raclot's business advertising events such as French classes and spa days. These messages did not give the parents the option, now frequently contained in emails of this sort, to unsubscribe from the email list. At the hearing Raclot explained that the parents had asked to be placed on the email list but later asked to be removed; Raclot was unable to remove them from the list. The record does not clearly indicate how the matter was resolved, but the parents stopped sending Mbengue messages on this issue.

Near the end of that school year there was a meeting on June 4, 2009, between Raclot and Mbengue. During that meeting Mbengue told Raclot that she was too negative that school year and he recited the events described above. Mbengue also told Raclot that he was giving her a last chance and that he would let her go if she continued like that. The facts in this

paragraph are based on a composite of the credible testimony of Mbengue and his notes and credible portions of Raclot's testimony. Raclot denied that Mbengue told her that he was giving her a last chance, but in this instance I conclude Mbengue's testimony is more credible than Raclot's denial. That comment appears in Mbengue's notes made near the time of the meeting and I find nothing to persuade me that those notes are not an accurate reflection of what occurred at the meeting. And remember that during that school year Mbengue found it necessary to give Raclot both a written reminder and a written warning.

On July 8, 2009, before the new school year began, Raclot informed Mbengue that she would be arriving three days late to start of the school year due to personal reasons. The first week of the school year is "training week" for the teachers. On July 23, 2009, Mbengue replied:

It is absolutely necessary that the entire team be present for the 1st week of training. Since you are a teacher, you have had 2 months of vacation to plan and take care of all your personal business. Therefore, except in cases of extreme necessity, an absence during this week cannot be authorized. However, I remain available to discuss the situation if you wish.

On July 31, 2009, Raclot responded:

I have no option than to be there September 3rd at the earliest. I have never before asked for such a thing, but I have an emergency situation and can do nothing to change it. I will have no problems repeating any trainings I miss, if necessary, or to miss being paid for those 3 days, but I am asking you for this permission as a favor, having no other solution. I am sorry for this (my problem) has fallen on these days.

After Raclot arrived at school on September 3 Mbengue informed her that she would not be paid for the three days. And on a Saturday morning Raclot then made up some of the training she missed.

Due to the school's layout, children had to pass through Raclot's classroom if they needed to use the bathroom facilities in that annex building; otherwise the students would have to use the bathroom facilities in the main building. On September 11 Mbengue advised the teachers that the students in the annex building were allowed to pass through the classrooms to use those bathroom facilities any time they needed and that the students knew to be quiet as they passed through the teaching areas. On about September 16 students passing through Raclot's class apparently failed to adhere to the expectation that they should pass quietly through the teaching areas and instead disrupted Raclot's class. Raclot scolded them and forbid them to pass through her class again. Mbengue was informed of this incident by a message from Steensma, who did not herself witness the event. Mbengue then advised Raclot that she had to let the children pass through her class to use the bathrooms. Raclot replied that the children had been disruptive. Mbengue replied that he heard what she was saying, but she nonetheless had to allow them to pass through her class. Raclot accepted this instruction and apparently the problem did not occur again. To the extent that Steensma's testimony and message about this event conflicts with Raclot's, I credit Raclot. It was apparent from the message and from her demeanor that Steensma continued to harbor ill will against Raclot for the incident that had occurred several years earlier; Steensma sought to magnify the incident to trigger a heightened response from Mbengue against Raclot. And, more importantly, Mbengue's muted reaction to the event signals to me that he too sensed a measure of exaggeration in Steensma's message.

On September 21, 2009, Raclot sent Mbengue a message asking to meet with him concerning the extension of her H-1B visa that was set to expire on September 14, 2010. Mbengue advised her to remind him in January because the school begins the visa process at that time.

5

During a “back to school night” in late September at which parents come to the school to meet the teachers, parents of students in Raclot’s class decided to purchase and keep a refrigerator and microwave oven in Raclot’s classroom. This was so that the students would not have to walk through the playground to the main building to retrieve their milk, juice, and snacks that the school provides. This was against the school’s safety and health rules and Mbengue had reminded teachers of this in a message on September 11. In other words, Raclot allowed the parents to circumvent the school’s express policy prohibiting such devices in the classroom. When in November Mbengue discovered that Raclot had a refrigerator and microwave in the classroom he told Raclot that he was not happy and Raclot should have first asked his permission. Raclot explained to him that she did not make that decision, the parents did, and she did want to have to call them and tell them to remove those items. Raclot asked that the school deal with those parents. Later the refrigerator and microwave were removed from the classroom.

15

20

On January 22 Raclot sent Mbengue the reminder and PFS at some point thereafter had its attorney begin the process for renewing Raclot’s visa, a financially costly process for PFS. On March 9, the day after the Union’s organizing committee, including Raclot, presented Mbengue with the letter requesting recognition, Mbengue called the attorney that PFS was using to prepare the documents to renew Raclot’s visa. Mbengue instructed the attorney to stop work on procuring the visa for Raclot.

25

On March 24, two days after his meeting with Raclot and the other members of the union organizing committee described above, Mbengue sent Raclot the following email message “I would like to meet with you today to discuss: curriculum mapping, scope and sequences and distribution of union paper during work time.” By way of explanation of the reference to “scope and sequence” in the message, PFS had been seeking accreditation from the Pacific Northwest Association of Independent Schools, or PNAIS. As part of the accreditation process PFS had to complete the scope and sequences of the classes taught at the school. Teachers were assigned to create the scope and sequence of what was taught in their class. This was done under the guidance of Anne Robins, the English Coordinator for PFS. Apparently the scope and sequence document contemplated a description of what was being taught in class on a week by week basis. This did not square well with the method the classes were actually taught at PFS as directed by the French Ministry of Education. Also, that curriculum was in French while the teachers were to write the scope and sequence in English, so French-speaking teachers encountered translation problems. On May 29, 2009, Robins sent a message indicating that the PNAIS documents should be submitted to her by June 1, 2009. On June 3, 2009, she sent another message to ten persons, including Raclot, stating that they had not yet submitted their scope and sequence documents and to submit them so that she might work on the PNAIS documents over the summer break. On June 18, 2009, Raclot submitted some documents to Robins, but they were inadequate. On October 5, 2009, Robins sent another message to a large number of employees indicating that the PNAIS accreditation documents, including the scope and sequence documents, were due October 9, 2009. On November 12, 2009, Mbengue met with Raclot and told her that the scope and sequence material was important and she had to complete it. Raclot replied that she had prepared something but it was wrong. Raclot finally submitted the scope and sequence documentation on about November 18, 2009. Although Raclot was apparently the last teacher to submit these documents, Mbengue acknowledged that teachers were having problems creating the scope and sequences because the French

30

35

40

45

50

curriculum functioned by “period” whereas the American curriculum functioned by “units.” Returning back to March 24, Raclot met with Mbengue that same day. Anne Robins also attended the meeting. Mbengue announced that PFS was not going to work on getting her visa extended. Mbengue also stated that some teachers had told him that Raclot was distributing union papers during work time. After Raclot denied that she was doing so on work time Mbengue dropped the matter. Mbengue then said that Raclot’s curriculum mapping was not online when he checked at some point earlier. Raclot replied that it was on the UBS key that she worked with. Mbengue then said that when he did examine her curriculum mapping that she had posted online he found terms such as “TERC” and “place value” and other things that he did not remember in the French curriculum. Mbengue said that the curriculum mapping is meant to reflect what is actually being taught in class. Mbengue then raised the subject of scope and sequences; remember that Raclot had submitted those documents months ago. According to Mbengue, he said he spoken with Anne Robins and discovered that Raclot had failed to complete those documents as they pertain to the social studies section and the math section had the same unfamiliar terms as were in Raclot’s curriculum mapping. According to notes of the meeting that Mbengue prepared he told Raclot “You were the only one not respecting the deadline in October. Even Rozenn who took a new class did a very thorough job. You are still trying to sabotage the PNAIS accreditation as I already told you.”

I pause now in the recitation of the facts to discuss what I make of this meeting. It seems apparent to me that Mbengue was now attempting to justify after the fact his decision to cancel the extension of the Raclot’s visa. But the effort smacks more of scouring Raclot’s past work record to find fault rather than criticisms that would have surfaced in the normal course of business. This is especially so because Benedicte Ricordel credibly testified that the scope and sequence documents that she submitted did not reflect what actually was being taught in class but no one complained about that to her. And about three years ago Beauvallett participated in the accreditation process for a French school in another city. She was part of a team sent by PNAIS to assess the conformity of that school with their standards. Beauvallett credibly testified that the specific details of the scope and sequence documents were not something that the PNAIS assessed in reviewing a school for accreditation. I point this out not to substitute Beauvallett’s judgment for that of PFS, but rather to show that PFS sought to magnify the shortcoming in Raclot’s documents after she revealed herself to be a union supporter. Remember, PFS did not find the shortcomings in those documents significant enough to have them corrected. After all, the PNAIS team visited PFS the week of March 28 and apparently examined PFS’s scope and sequence documents, including Raclot’s, and PNAIS granted PFS conditional accreditation. I have also considered the testimony of Anne Robins, who has been a teacher at the school for about 19 years. As indicated, Robins was charged with assembling the paperwork created by the teachers to submit. She testified that when Raclot submitted her scope and sequence material in November the portion on social studies was missing but she chose not to say anything about it because it had been so difficult to get the material in the first place. Robins testified that she later discovered that the language portion of Raclot’s scope and sequence documents was almost identical to the second grade scope and sequence instead of the third grade that she taught and that the math portion used phrases that were not used in at PFS. Robins claimed that she brought this matter to Mbengue’s attention when she showed him the final package for approval in early March, probably around March 5 or 6. Robins also testified concerning the March 26 meeting. Her testimony was summary in nature and devoid of anything that could be construed as negative against PFS; her demeanor was unpersuasive. I conclude that Robins’ testimony was designed to help PFS’s litigation chances rather than an attempt to accurately relate facts. I do not credit any testimony that recent events, other than the union organizing effort, prompted Mbengue to have this meeting with Raclot.

After this meeting with Mbengue on March 24 Raclot called the office of the lawyer hired by PFS who had been working on her visa extension. Raclot was able to speak with an assistant. Raclot asked if the assistant had all the paperwork that Raclot had earlier sent. The assistant indicated that she had all that paperwork but that PFS had instructed them to stop work on Raclot's visa.

On March 25 the assistant sent Mbengue and Raclot an email message as follows:

I wanted to let you know that Patricia Raclot called me again today asking if we had begun or filed an H-1B extension for her yet with USCIS. I asked her to check with you since we were asked to put this project on hold on March 9th. She said she would check with you on this.

On April 8 Raclot again met with Mbengue. Mbengue proceeded to describe a list of issues that he had with Raclot's work that lead to the announcement of his decision not renew Raclot's contract for the coming school year. Mbengue first mentioned the incident when Raclot had refused to tutor two students that lead to Raclot's written warning in the prior school year, described above. Mbengue then mentioned the fifth grade evaluations that Raclot refused to correct during the prior school year, also described above. In the 2009-2010 school year, unlike the earlier school year, Raclot assisted the 5th grade teacher in correcting the evaluations. Mbengue mentioned how Raclot angrily left the teachers' meeting, how Raclot told another teacher that the teacher did not have to complete two surveys, and the complaint from parents over the emails they received from Raclot concerning Vinideus. All these events also occurred during the prior school year and have been described above. At the April 8 meeting Mbengue also mentioned the scope and sequence matter, described above. He next referred to the incident at the start of the school year when Raclot missed the first 3 days. Mbengue testified that he was upset by the fact that Raclot had not shown up on those days in September "Because anyway, prior to that I had just fired a teacher for doing the same thing." I do not credit this testimony. Upon cross-examination it became clear that the teacher he had fired for "doing the same thing" did not call in or send any explanation as to why he was not going to show up; Raclot had informed Mbengue of her personal situation almost two months in advance. Returning to the April 8 meeting, Mbengue referred the time during the school year when Raclot refused to allow children to pass through her classroom to use the bathroom. Mbengue then complimented Raclot on her classroom performance. He also said she had a good relationship with the parents and with the other teachers. Mbengue concluded by telling Raclot that he was not going to renew her contract even though she had done some good things for the school.

On June 10, 2010, Mbengue gave Raclot her written evaluation. Mbengue wrote that Raclot had good relationships and communications with parents, her class preparations are well done, and the classroom is nicely decorated. However, Mbengue indicated that Raclot had a very negative attitude despite the recommendations of the administration in the 2008–2009 annual evaluation; unauthorized absence, documents that were given late and repeated insubordination.

In late June there was a meeting with the teachers and staff that is held at the end of every school year. At this meeting, Mbengue discussed the concluded school year and the challenges brought by the union organizing effort. Mbengue then said that now that the toxins or poisons of the school are gone there will be a smoother year ahead. These facts are based on the credible testimony of Mboup, Raclot, and Beauvallett. I have considered Mbengue's denial that he made the comments ascribed to him. He testified that he did use the word "poisonous" but it was made with reference to a matter that was brought to his attention by

teacher Helene Brier. Mbengue claimed that he told the teachers a lengthy story about this matter and described it as poisonous. However, in the notes made of the meeting there is no reference to this lengthy story. I conclude this testimony was simply created to explain how discussion of “poisons” may have arisen at the staff meeting.

5

At some point PFS announced that it was hiring two assistant heads of school to work under Mbengue. On about September 3 another teacher told Mboup that Mbengue wanted to talk to him. That teacher reached Mbengue using his own telephone and then handed the telephone to Mboup. Mboup and Mbengue discussed settlement of the unfair labor practice charges. Mbengue said that Mboup was the only “big fish” there and if Mboup dropped out there would not be a union at the school. Mbengue also said that with the “new configuration” at the school it would be hard to bring in the union.

10

PFS’s employee handbook provides for three levels of discipline: verbal counseling, written warnings, and dismissal. Unlike the previous school year, Raclot did not receive any written warnings during the 2009–2010 school year.

15

Analysis

The complaint alleges that PFS cancelled its renewal of Raclot’s work visa and failed to renew her employment contract because Raclot supported the Union. I again apply *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S.989 (1982), approved in *NLRB v. Transportation Management*, 462 U.S. 393 (1983). I first assess whether the General Counsel has met his initial burden. Raclot was a member of the Union’s organizing committee and PFS was well aware of that fact. PFS was hostile to the union activities and, as described above, repeatedly violated the Act in an effort to stifle those activities. Moreover, the decision to stop work on the visa came the day after PFS learned of the Raclot’s union support. And at the same meeting that Mbengue announced to Raclot that PFS would not renew her visa he questioned her about her union activity. I have considered Mbengue’s testimony concerning the reasons why he decided to begin the process to renew Raclot’s visa only to terminate it so abruptly, but I find that explanation thoroughly unconvincing and his demeanor while giving that testimony was hesitant and uncomfortable and likewise unconvincing. In the absence of any other credible explanation this timing offers compelling support that the motivation was Raclot’s support for the Union. The General Counsel has easily met his initial burden under *Wright Line*.

20

25

30

35

I now address whether PFS has met its burden of showing that it would not have renewed Raclot’s visa and contract even if she had not engaged in union activity. As for the incidents that occurred prior to the beginning of the 2009–2010 school year, I consider those only as background to assess Raclot’s conduct during that school year. After all, Mbengue had decided to renew Raclot’s contract albeit with a warning that he was giving her a last chance not to repeat such conduct. Focusing on the events of the 2009–2010 school year, as more fully described above Raclot arrived at the school three days late. She was not paid for those days and she made up some training she had missed; she was not disciplined for the incident. There was also the incident where Raclot informed unruly students that they could no longer pass through her classroom to use the restrooms. And Raclot allowed parents to place a microwave and refrigerator in her classroom, thereby skirting the school’s prohibition of such items in the classroom based on safety concerns. In its brief PFS also raises scope and sequence materials and related documents prepared by Raclot, but I have already concluded above that this matter became a concern of Mbengue’s only after he learned of Raclot’s support for the union. Rather than supporting PFS’s case it actually serves to undermine it; it shows that Mbengue was trolling Raclot’s record in an effort to undercover problems to support a decision previously

40

45

50

made to terminate Raclot's visa. Moreover, I have concluded above that Mbengue went through a similar process to create a reason to unlawfully discipline Raclot's fellow union supporter and companion Mboup. So I am left with three events: the late reporting for school, the unruly students' use of the restroom, and the microwave and refrigerator in the classroom. All occurring months before Mbengue decided to terminate Raclot's contract; she was not formally disciplined for any of them. This is unlike the previous year and to this extent at least was an improvement from that year. Importantly, she was not told at those times that Mbengue had decided not to renew her contract; rather, Mbengue took initial steps to have Raclot's visa renewed after they occurred. It was only after Mbengue learned that Raclot was a supporter of the union that he abruptly decided to terminate her contract and inform her of that fact. Remember, PFS's burden is to show not only that Raclot's work performance was flawed; it must show that PFS would have failed to renew her contract because of such flawed performance. I also take into account the very strong nature of the General Counsel prima facie case. Even keeping in mind that Raclot had been given a last chance to improve her performance, under all of these circumstances I conclude that PFS had failed to meet its burden of showing that it would not have renewed Raclot's visa and contract even if she had not supported the union. By cancelling its renewal of Raclot's work visa and failing to renew her employment contract because Raclot supported the Union, PFS violated Section 8(a)(3) and (1).

June 16 Message

On June 16 Mbengue sent an email message addressed to the Union organizing committee that, in pertinent part, follows.

Since the beginning of this whole union issue you have deliberately chosen to violate repeatedly the school confidentiality policy:

- our parents home addresses have been given to the AFT-Oregon (a third party) to send unsolicited emails (twice).
- our parents email addresses have been used to invite them to a Solidarity Night and without even the decency to bcc them. Their email addresses are exposed to everyone. Some of you are even trying to get the parents data base.
- a 4th grade student's confidential incident report filled in by Mathias has been taken by Patricia Raclot and given to the AFT lawyer after a shameful setup to prove that Anne Robins was a supervisor therefore cannot vote.
- emails to / from the head of school about confidential personal matters have been bcced to parents by two of you.
- during the last school council all of you came without warning to deliver a petition. Even though only two of you are members of the school council I let you all stay with the condition that you would not participate in the discussion. Most of you ended up participating in the debate and we left the meeting at 11 pm. And you still claim you do not have a voice in this school.

To try to pressure the administration with a smear campaign with the help of the AFT-Oregon members in order to get a union will never work. It is absolutely disrespectful toward those faculty and staff (whatever the number) who do not share your views and voted on April 16 against having a union at PFS.

Why can't we all wait until the voting process is over and that the NLRB publish the results? If a union is voted in, so be it. If not you have to accept it and stop this damaging campaign. If the NLRB determines that Patricia Raclot and Becky Conant should be taken back, they will be taken back. However, if the NLRB determines that the school is right not to renew their contracts, a million signatures or one thousand marches will not sway our decision. You have also requested that the election be

canceled and another vote be organized. If the NLRB follows you and orders a new election then so be it. The only thing you will accomplish is to further damage the reputation of the school in the community. We do not need that specially in these tough economic times.

5 We cannot continue to tolerate this unprofessional destructive behavior. It needs to stop now.

Analysis

10 The complaint alleges that on June 16 PFS violated Section 8(a)(3) and (1) by enforcing the rules disparately and selectively by applying them only to employees who supported the Union. In his brief, the General Counsel argues the email is unlawful because it “is an unlawful enforcement of Respondent’s confidentiality rule, as it disparately applied that rule to employees who were using the email list for Union activity[.]” In this regard the General Counsel points out that PFS allowed Scanlan to use its email addresses to send out the antiunion message,
15 described above, shortly after the March 26 meeting with employees. However, Scanlan was still on PFS’ board of directors at the time. Certainly PFS may use its resources to communicate with employees and parents without having to allow employees to do the same. The General Counsel cites *Emergency One, Inc.*, 306 NLRB 800 (1992) and similar cases. But those cases involve situations where an employer prohibited employees from talking about a union while at the same time it allowed employees to talk about other matters. There is no
20 evidence in this case that PFS allowed use of its email information for nonwork related matters. *E.I du Pont & Co.*, 311 NLRB 893, 919 (1993), also cited by the General Counsel, makes this point. In that case the employer allowed use of its email for a wide range of nonwork related purposes. This is precisely the type of evidence that is missing in this case. I emphasize the
25 narrowness of the complaint allegation and the argument in support of it – disparate treatment. While the June 16 message may have violated the Act in other respects, I will not supply a legal theory to find a violation on another basis when then theory is neither alleged in the complaint nor argued in a brief. Because the evidence does not show that PFS allowed its employees to use confidential information for nonwork related matters I dismiss this allegation.

30

Conclusions of Law

1. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

35

(a) Maintaining work rules that forbid employees from discussing working conditions with each other and others and from disclosing working conditions at PFS without prior approval.

40

(b) Telling employees that the union was a stigma and stigmatized the school and the principal.

45

(c) Threatening that the school would close if employees decided to be represented by a union.

(d) Threatening employees with unspecified reprisals if they continued to support the union.

50

(e) Implying that it would remedy employee grievances if the employees stopped their union activities.

2. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by:

(a) Issuing a final warning to Massene Mboup because he supported the Union.

(b) Imposing a contract renewal deadline because the employees supported a union.

(c) Cancelling the renewal of Raclot's work visa and failing to renew her employment contract because Raclot supported the Union.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully maintained certain work rules, I shall require it to emend those rules as described in *Guardsmark, LCC*, 344 NLRB 809, 812 fn. 8 (2005). Having found that the Respondent unlawfully gave a final warning to Massene Mboup, I shall require it to rescind the warning. Having found that Respondent cancelled its effort to have Raclot's work H-1B visa renewed, I shall require that Respondent resume its efforts to obtain an appropriate visa for Patricia Raclot. *Hafadal Beach Hotel*, 321 NLRB 118, 120–121, enfd. 116 F.3d 485 (9th Cir. 1997, cert. denied 522 U.S. 1107 (1998)). The Respondent having discriminatorily failed to renew Raclot's employment contract, it must renew that contract and offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Because Raclot's reinstatement may have to await the issuance of an appropriate visa, I shall amend the traditional 14-day reinstatement order upon the condition that such reinstatement occur within 14 days after it is lawful to do so. In his brief the General Counsel requests that the Notice to Employees be posted in French as well as English. I deny that request; there is no evidence the employees are not fully conversant in English. The General Counsel also requests that Respondent be ordered to read aloud the Notice due to the impact of the captive audience meeting on employees. I deny that request also. Although the unfair labor practices committed by PFS are indeed serious, I conclude traditional remedies are adequate to remedy them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, French American School of the Pacific Northwest, d/b/a Portland French School, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Maintaining work rules that forbid employees from discussing working conditions with each other and others and from disclosing working conditions at PFS without prior approval.

(b) Telling employees that the union was a stigma and stigmatized the school and the principal.

(c) Threatening employees that the school would close if employees decided to be represented by a union.

(d) Threatening employees with unspecified reprisals if they continued to support the union.

(e) Implying that it would remedy employee grievances if the employees stopped their union activities.

(f) Imposing a contract renewal deadline because the employees supported a union.

(g) Disciplining employees because they support a union.

(h) Cancelling efforts to obtain work visas for employees because those employees supported a union

(i) Failing to renew employment contracts, discharging or otherwise discriminating against any employee for supporting the Union or any other union.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful handbook rules furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline issued to Massene Mboup, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(c) Within 14 days from the date of the Board's Order, resume efforts to obtain an appropriate visa for Patricia Raclot.

(d) Within 14 days of the time that it may lawfully do so, offer an employment contract and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(e) Make Patricia Raclot whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

5 (f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discrimination against Patricia Raclot, and within 3 days thereafter notify her in writing that this has been done and that this will not be used against her in any way.

10 (g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

15 (h) Within 14 days after service by the Region, post at its facility in Portland, Oregon, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 36, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in
20 conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these
25 proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 9, 2010. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means.

30 (i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

35 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 27, 2010

40

William G. Kocol
Administrative Law Judge

45

50 ⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain work rules that forbid employees from discussing working conditions with each other and others and from disclosing working conditions at PFS without prior approval.

WE WILL NOT tell employees that a union is a stigma and stigmatized the school and the principal.

WE WILL NOT threaten employees that the school would close if employees decide to be represented by a union.

WE WILL NOT threaten employees with unspecified reprisals if they continued to support the Associated French School Employees, American Federation of Teachers—Oregon, American Federation of Teachers, AFL–CIO, or any other union.

WE WILL NOT imply that we will remedy employee grievances if the employees stopped their union activities.

WE WILL NOT impose a contract renewal deadline because the employees supported a union.

WE WILL NOT discipline employees because they support a union.

WE WILL NOT cancel our efforts to obtain appropriate visas for employees because those employees support a union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Associated French School Employees, American Federation of Teachers—Oregon, American Federation of Teachers, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL supply all of you with inserts for the current employee handbook that (1) advise you that the unlawful rules have been rescinded or (2) provide the language of lawful rules; or WE WILL publish and distribute revised handbooks that (1) do not contain the unlawful rules or (2) provide the language of lawful rules.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline issued to Massene Mboup, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, resume our efforts to obtain an appropriate visa for Patricia Raclot.

WE WILL, within 14 days of the time that we may lawfully do so, offer an employment contract to Patricia Raclot and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Patricia Raclot whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discrimination against Patricia Raclot, and within 3 days thereafter notify her in writing that this has been done and that this will not be used against her in any way.

French American School of the Pacific Northwest,
d/b/a Portland French School

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948
Seattle, Washington 98174-1078
Hours: 8:15 a.m. to 4:45 p.m.
206-220-6300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 206-220-6284.